

No. PD-0035-18
IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/20/2018
DEANA WILLIAMSON, CLERK

FREDDY GARCIA
Appellant

v.

THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review of Cause No. 14-16-00242-CR
In the Fourteenth Court of Appeals, Reversing Judgment in Cause Number 0482220
From the 174th District Court of Harris County, Texas
Honorable Ruben Guerrero, Presiding

APPELLANT'S REPLY TO PETITION FOR DISCRETIONARY REVIEW

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PRESIDING JUDGE:

Hon. Ruben Guerrero
174th District Court
Harris County, TX

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STATEMENT REGARDING ORAL ARGUMENT

There is no need for full briefing or oral argument. Neither ground of review proposed by the State presents a new or important question for the Court's consideration. The first issue, regarding the so-called election rule, has been addressed by this Court multiple times, most recently in *Owings v. State*. The second issue presents a question that is not raised by the record in this case.

REPLY TO GROUNDS FOR REVIEW

*“What’s in a name? that which we call a rose
By any other name would smell as sweet ...”*

William Shakespeare, *Romeo and Juliet*, Act II, Scene II

Just four months ago, this Court rejected the State’s argument that a jury charge can be considered a late election. *See Owings v. State*, __ S.W.3d __, 2017 WL 4973823 at *5, n. 8² (Tex. Crim. App., Nov. 1, 2017) *citing with approval Owings v. State*, 507 S.W.3d 294, 304 (Tex. App. – Houston [1st Dist.] 2016) (“It has become axiomatic that an election made in the jury charge is not a *de facto* election.”). Now, the State has renamed the jury charge a “mere delay,” rather than a “late” election. *See State’s Petition for Discretionary Review*, p.11. Other than the new name, the argument is the same.

With apologies to The Bard and his star-crossed lovers, that which we call a late election, by any other name (including “merely delayed”), would still be no election at all. *See Phillips v. State*, 193 S.W.3d 904, 912 (Tex. Crim. App. 2006) (“A jury charge cannot be a *de facto* election, because the instruction is not given until the end of trial”); *Owings, supra*. The court of appeals correctly held that the lack of a timely election was constitutional error.

RELEVANT FACTS

As the court of appeals noted, this case involves evidence from different witnesses who described two distinct penetrative assaults that occurred under different

circumstances, at different times, in different rooms, of different apartments. *See Garcia v. State*, __ S.W.3d __, 2017 WL 6374691 (Tex. App. – Houston [14th Dist., Dec. 14, 2017) (opinion on rehearing) (pet. filed).

The indictment against Appellant alleged a single sexual assault, based on an outcry from the complainant and her mother on August 17, 1987 (CR at 4). They told police that the previous day (that is, on August 16, 1987), the complainant's mother had returned home from an errand unexpectedly early, and found Appellant attempting to sexually assault the complainant in a bedroom in the apartment where they all lived. Though neither one said that penetration had occurred, a police officer testified at trial that she recalled the complainant saying that there had been penetration during the incident on August 16, 1987 (3 RR at 99).

As trial was set to begin, however, the complainant, by then 41 years old, testified at a pretrial hearing that Appellant had sexually assaulted her once before, in the bathroom of a different apartment, by penetrating her vagina with his penis (3 RR at 16). In light of this surprise allegation, Appellant timely moved, on multiple occasions throughout the trial, for the court to order the State to elect which of the two alleged offenses it intended to submit to the jury. *See, e.g.*, 3 RR at 122. The trial judge agreed with the State's erroneous assertion that an election was not required until the close of all the evidence (4 RR at 69).

Once the evidence was closed, however, the State still did not give any notice to the court or Appellant. Then, the next day, the newly-alleged offense (the earlier sexual

assault in the bathroom at a different apartment) was described in the jury charge, though the alleged date remained on or about August 16, 1987, the date for the original offense described in the indictment (CR at 112).

The Fourteenth Court of Appeals concluded this was constitutional error, and that there was a significant danger that: 1) jurors could merge both offenses to find Appellant guilty; or 2) six jurors could convict on the basis of one alleged incident and six could convict on the basis of the other alleged incident. The court also determined that the error violated Appellant's right to notice of the charge he was to defend against. The appellate court noted that the dangers were increased by the jury charge, and by closing arguments based on the charge's conflated description of a single penetrative assault occurring both (1) "while inside a bathroom inside an apartment [complainant] . . . shared with her mother, brothers, and the defendant;" *and* (2) "on or about the 16th day of August, 1987" — a date that corresponds to a separate bedroom incident in another apartment. *Garvia*, 2017 WL 6374691 at *12.

FIRST GROUND OF REVIEW, RESTATED: Is the constitutional harm standard the proper test for harm when there was a mere delay in the election versus no election at all and the jury is charged on a specific incident?

REPLY: The State's first ground of review travels a well-worn path that this Court re-visited only four months ago.

In *Owings v. State*, the election case decided by this Court in November, the Court reiterated that a jury charge is not a late election. *See Owings*, 2017 WL 4973823 at *5 n. 8. The Court noted that there was no meaningful distinction between a *failure* to elect

versus a *late* election. This case presents the same issue, called by a different name (“a rose by any other name”).

1. The State offers no reason for the Court to revisit election error yet again.

In a series of cases over a 30-year period, this Court has consistently held that the absence of a timely election is constitutional error. In some cases, the Court has held the error harmless beyond a reasonable doubt; in others, the Court has held that the facts create a reasonable doubt about whether the error is harmless. In either circumstance, what constitutes error has not changed. The cases can be summarized as follows:

1. If a defendant makes a timely request, the trial court must order the State to elect the offense it intends to submit to the jury, no later than the close of the State’s case. *See O’Neal v. State*, 746 S.W.2d 769, 772 (Tex. Crim. App. 1988);
2. The failure to require the State to elect upon timely request results in constitutional error. *See Phillips v. State*, 193 S.W.3d 904, 914 (Tex. Crim. App. 2006);
3. A jury charge is not a substitute for an election. *Phillips*, 193 S.W.3d at 912.
4. Election error is harmless beyond a reasonable doubt when a jury could not have been confused when deciding the defendant’s guilt on one of 100 identical offenses. *See Dixon v. State*, 201 S.W.3d 731, 236 (Tex. Crim. App. 2006); and
5. “There is no meaningful distinction to be drawn on this record between a failure to elect versus a late election. The State posits a ‘late election’ that occurred in the jury charge. But ‘the jury charge does not serve ‘as a *de facto* election’ because it is given too late in the trial to afford a defendant the requisite notice to defend.’ ” *Owings v. State*, ___ S.W.3d ___, 2017 WL 4973823, at *5 n.8 (Tex.

Crim. App. Nov. 1, 2017) (citation omitted).

The State again asks the Court to consider whether the constitutional error standard should apply, but points to no new facts that have not been addressed in earlier cases. Nor has the State offered any policy reasons for upending a standard that has worked well for the courts of this state since at least 1988, when *O'Neal* was decided.

2. The court of appeals applied this well-established body of law to the record before it and concluded, as this Court did in *Phillips*, that the constitutional error was not harmless beyond a reasonable doubt.

The court of appeals considered each of the cases cited above before concluding the election error in this case was harmful. In fact, when *Owings* was handed down after the court of appeals' original opinion, the lower court withdrew that opinion and reconsidered Appellant's case in light of *Owings*. See *Garcia*, 2017 WL 6374691 at *11. The result, as it turned out, remained the same. The court concluded that "harmful error is shown because the circumstances here are much more similar to those in *Phillips* than they are to those in *Owings* or *Dixon*." *Id.* at *12.

The court decided that because of the State's failure to elect which act it was relying upon for a conviction, it was possible that the jury convicted appellant by combining the bathroom incident and the August 16, 1987 bedroom incident to overcome reasonable doubt. *Id.* at *8. Likewise, it was possible that some members of the jury convicted based on the bathroom incident, and others convicted based on the August 16, 1987 bedroom incident. *Id.* at *12. Further, the court decided, as a result of the State's failure to make an election appellant did not have adequate notice of which

act the State would rely upon in time to present his defense, and was therefore required to defend against both potential offenses. This last violation was somewhat moderated by appellant's outright denial of any wrongdoing, but that did not excuse the State's failure to elect, according to the lower court. Ultimately, the Court determined, "... we cannot say beyond a reasonable doubt that the trial court's error in failing to require the State to elect did not contribute to appellant's conviction." *Id.* at *9.

The court of appeals' opinion so carefully follows both the error and the harm analyses set out in this Court's precedents that it presents nothing for review here. The State's effort to rename the issue as "mere delay" does not create a reason for this Court to grant review.

SECOND GROUND OF REVIEW, RESTATED: How specific must the factual rendition of a single incident in the jury charge be to serve the purposes of the election requirement?

REPLY: The court of appeals did not review the jury charge language for specificity, nor did Appellant make it an issue on appeal. The State's second ground of review is not raised by the facts of this case.

Either a trial court orders an election to be made at the close of the State's case, or it does not. If, after a timely request by the defendant, it does not, then there is constitutional error. What remains is an analysis to determine whether that error was harmless beyond a reasonable doubt. *See* Tex. R. App. Proc. 44.2(a).

Contrary to the State's suggestion, the court of appeals did not find error in the indictment's – and the jury charge's – use of "on or about" language. Appellant did not

challenge this language below, and the appellate court here did not address is as a ground of error. Rather, in conducting its harm analysis, the court of appeals considered the confusing jury charge and closing arguments as part of its review in light of the four underlying purposes for the election rule, as instructed by this Court. *See Owings*, 2017 WL 4973823 at *5. Three of those factors weighed in favor of reversal, the court held.

The court's discussion of the confusion created by the jury charge and closing arguments arose as part of its consideration of the second and third harm factors:

- (2) to minimize the risk that the jury might choose to convict not because one or more crimes were proved beyond a reasonable doubt, and
- (3) to ensure a unanimous verdict as to one specific incident which constituted the offense charged in the indictment.

First, the court ruled that there was at least some evidence of two separate penetrative sexual assaults: (1) the bathroom incident; and (2) the August 16, 1987 bedroom incident. Because the evidence was presented from different sources, there was an increased likelihood that the jury added up different events and testimony from different witnesses in rendering its verdict, it concluded. *Garvia*, 2017 WL 6374691 at *7.

Then, the court pointed out additional circumstances that further increased the likelihood that the election error “thwarted the purposes underlying the second and third *Dixon* factors.” *Id.* at *8. Specifically, the court noted that the jury charge both: (1) conflated the two distinct incidents in its description; and (2) instructed that the jury

was not bound by the specific date alleged in the indictment. The court also noted that the closing arguments also conflated the two alleged incidents and did not clear up the confusion. *Id.*

This opinion neither strays from precedent nor attempts to create new precedent. In fact, the court compared the facts here to those in *Phillips*, *Dixon*, and *Owings* for guidance. It specifically based its holding on *Phillips v. State*, 130 S.W.3d 343, 353 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 193 S.W.3d 904 (Tex. Crim. App. 2006). It found the facts of this case much more analogous to *Phillips* than to *Owings* or *Dixon*, and so reversed Appellant’s conviction. On this record, the Court need not visit the issue of election error yet again.

PRAYER

Appellant respectfully requests this court to refuse the State’s Petition for Discretionary Review.

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CERTIFICATE OF SERVICE

I certify that a copy of this reply was served electronically on the Harris County District Attorney's Office and the State Prosecuting Attorney on March 13, 2018.

/s/ Cheri Duncan

CHERI DUNCAN

CERTIFICATE OF COMPLIANCE

I certify that this reply complies with Rule 9.2, TEX. R. APP. PROC. It was prepared on a computer using 14-point Garamond type. Starting on page 1, it contains 2,200 words.

/s/ Cheri Duncan

CHERI DUNCAN